

## **El Masri (Migration) [2019] AATA 2436 (9 May 2019)**

### **DECISION RECORD**

|                           |                                                                                                                                                                                                                                                                     |
|---------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>DIVISION:</b>          | Migration & Refugee Division                                                                                                                                                                                                                                        |
| <b>APPLICANT:</b>         | Mrs Fatat EL MASRI                                                                                                                                                                                                                                                  |
| <b>CASE NUMBER:</b>       | 1719371                                                                                                                                                                                                                                                             |
| <b>DIBP REFERENCE(S):</b> | CLF2013/223407                                                                                                                                                                                                                                                      |
| <b>MEMBER:</b>            | Mireya Hyland                                                                                                                                                                                                                                                       |
| <b>DATE:</b>              | 9 May 2019                                                                                                                                                                                                                                                          |
| <b>PLACE OF DECISION:</b> | Sydney                                                                                                                                                                                                                                                              |
| <b>DECISION:</b>          | <p>The Tribunal remits the application for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 visa:</p> <ul style="list-style-type: none"><li>• cl.801.221(2)(b)-(d) of Schedule 2 to the Regulations</li></ul> |

Statement made on 09 May 2019 at 2:31pm

### **CATCHWORDS**

*MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – evidence of nature of household and social aspects of relationship provided – mutual commitment to shared life to exclusion of all others – genuine married relationship – young family – decision under review remitted*

### **LEGISLATION**

*Migration Act 1958 (Cth), ss 5, 65, 360*

*Migration Regulations 1994 (Cth), r 1.15, Schedule 2, cls 801.111, 801.221*

### **CASES**

*He v MIBP [2017] FCAFC 206*

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 8 August 2017 to refuse to grant the applicant, Fatat El Masri, a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. Mrs El Masri applied for the visa on 4 September 2013 on the basis of her relationship with her sponsor, Ibrahim Abdallah. At that time, Class BS contained one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate refused to grant the visa on 8 August 2017 on the basis that Mrs El Masri did not satisfy cl.801.221 because she did not respond to a letter requesting updated information about the relationship and so the delegate could not be satisfied that Mrs El Masri was the spouse of Mr Abdallah.
3. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration. In reaching its decision the Tribunal did not consider a hearing to be necessary, as it was able to find in favour of Mrs El Masri on the basis of the material before it, pursuant to s.360(2)(a) of the Act.

### CONSIDERATION OF CLAIMS AND EVIDENCE

4. Relevant to this matter, cl.801.111 and cl.801.221(2) of the Regulations requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen, Australian permanent resident, or an eligible New Zealand citizen specified in the related Subclass 820 (Partner) visa application as the spouse or de facto partner of the applicant. The Tribunal has seen Mr Abdallah's birth certificate and he is an Australian citizen and was identified in the Subclass 820 visa application as Mrs El Masri's spouse. On the evidence before it, the Tribunal is satisfied that Mrs El Masri continues to be sponsored for the grant of the Subclass 820 (Partner) visa by her 'sponsoring partner': cl.801.221(2)(b). The Tribunal further finds that at least 2 years have passed since the application was made: cl.801.221(2)(d).
  5. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, and the nature of their household and commitment to each other: r.1.15A(3). Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered<sup>1</sup> and the Tribunal has considered and satisfied itself about each.
  6. The Tribunal has viewed Mrs El Masri's and Mr Abdallah's marriage certificate and finds they were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
  7. The Tribunal has considered the evidence provided by Mrs El Masri and Mr Abdallah, including the birth certificates for their daughter, Sumayah, born 30 March 2015 and their son, Mostafa, born 27 January 2017. It has also considered their statements, statements
- <sup>1</sup>*He v MIBP* [2017] FCAFC 206.

from family and friends, photographs, travel history, evidence of a joint bank account, and medical records. It finds that evidence of the financial aspects of their relationship is inadequate and this is of concern. However, the other evidence strongly supports that the nature of their household, social aspects of their relationship, and in particular the nature of their commitment to each other, as well as all the other circumstances of the relationship demonstrate that they are in a genuine married relationship: r.1.15A(3).

8. The Tribunal finds that Mrs El Masri and Mr Abdallah have a mutual commitment to a shared life to the exclusion of all others, are in a genuine and continuing relationship, and live together in Prestons, New South Wales with their two children. They, therefore, meet all the requirements in s.5F(2)(b), (c), and (d) of the Act.
9. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) of the Act are met at the time of this decision. Therefore, Mrs El Masri is the spouse of Mr Abdallah, her sponsoring partner, and meets cl.801.221(2)(c) of the Regulations.
10. To meet cl.801.221(2)(a) Mrs El Masri must be the holder of a Subclass 820 visa at the time of this decision. The Tribunal notes that the Department of Home Affairs' records indicate that Mrs El Masri's Subclass 820 visa ceased when her Subclass 801 was refused in August 2017. She is currently the holder of a Bridging (Class WA) Subclass 010 visa granted on 17 July 2018. Because Mrs El Masri no longer holds a Subclass 820 visa the Tribunal cannot find that she meets all the criteria in cl.801.221 of the Regulations.
11. However, cl.820.221(8) applies where an applicant held a Subclass 820 (Partner) visa that ceased on notification of a decision of the Minister to refuse to grant a Subclass 801 visa. If the Tribunal remits that decision for reconsideration, Mrs El Masri will be entitled to a Subclass 801 if, as a result, the Minister decides that Mrs El Masri satisfies the criteria for the grant of the visa apart from the criterion that she hold a Subclass 820 visa.
12. In light of its findings above, the appropriate course is to remit the application for the visa to the Minister for consideration of the remaining criteria for a Subclass 801 visa.

## **DECISION**

13. The Tribunal remits the application for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 visa:
  - cl.801.221(2)(b)-(d) of Schedule 2 to the Regulations

Mireya Hyland  
Member

## ATTACHMENT - Extract from Migration Regulations 1994

### 1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
  - (a) a Partner (Migrant) (Class BC) visa; or
  - (b) a Partner (Provisional) (Class UF) visa; or
  - (c) a Partner (Residence) (Class BS) visa; or
  - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
  - (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
    - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
    - (v) the basis of any sharing of day to day household expenses; and
  - (b) the nature of the household, including:
    - (i) any joint responsibility for the care and support of children; and
    - (ii) the living arrangements of the persons; and
    - (iii) any sharing of the responsibility for housework; and
  - (c) the social aspects of the relationship, including:
    - (i) whether the persons represent themselves to other people as being married to each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).